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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FOREMOST INSURANCE COMPANY
AND SHIRLEY ELISER,
Petitioners,

versus

PANSY F. RICHARDSON, DONALD B. RICHARDSON, PATRICK S. RICHARDSON, JOSEPH S. RICHARDSON, LARRY S. RICHARDSON, CARLA RICHARDSON AND JUNE G. ALLEN,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

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PETITION FOR CERTIORARI

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QUESTION PRESENTED

Should the admiralty jurisdiction of the federal courts be extended to accidents occurring between purely recreational boats in which there is absolutely no commercial activity involved?

LIST OF PARTIES PURSUANT TO RULE 21.1(b)

1. Petitioners: Foremost Insurance Company and Shirley Eliser (Defendants-Appellees, below)

2. Respondents: Pansy F. Richardson, Donald B. Richardson, Patrick S. Richardson, Joseph S. Richardson, Larry S. Richardson and Carla Richardson (Plaintiff-Appellants, below)

3. Respondent, June G. Allen (Defendant-Appellee, below)

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On Petition for a Writ of Certiorari to the
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For the Fifth Circuit

PETITION FOR CERTIORARI

The petitioners, Foremost Insurance Company and Shirley Eliser, defendants-appellees below, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of

Appeals for the Fifth Circuit entered in this case on April 2, 1981, reversing the judgment of the United States District Court for the Middle District of Louisiana entered on May 23, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Richardson v. Foremost Ins. Co.*, 641 F.2d 314 (5th Cir. 1981). The opinion of the District Court is reported as *Richardson v. Foremost Ins. Co.*, 470 F.Supp. 699 (M.D. La. 1979). The opinions are reprinted in the Appendix commencing on pages 1a and 8a respectively.

JURISDICTION

The judgment of the Court of Appeals was entered April 2, 1981. A timely motion for rehearing was denied by that Court on May 4, 1981, and this petition for certiorari was filed within 90 days of that date. This Court has jurisdiction to review the judgment by Writ of Certiorari under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

I.

U.S. Constitution, Article III, Section 2. See Appendix "D" for verbatim text at pp. 27a-28a.

II.

28 U.S.C. §1254. See Appendix "D" for verbatim text at pp. 28a-29a.

III.

28 U.S.C. §1333. See Appendix "D" for verbatim text at p. 29a.

IV.

33 U.S.C. §154. See Appendix "D" for verbatim text at pp. 29a-30a.

STATEMENT OF THE CASE

This petition for writ of certiorari puts at issue the scope of admiralty jurisdiction granted the federal courts pursuant to Article III, Section 2 of the U.S. Constitution, and 28 U.S.C.A. §1333.

The incident giving rise to this litigation involved a collision between two "pleasure" boats. One was an eighteen foot pleasure boat powered by a 185 h.p. Johnson outboard motor that was being used for water skiing purposes at the time of the accident. The other was a sixteen foot "bass boat" powered by an outboard motor that was used exclusively for pleasure fishing. At the time of the accident the two boats were headed in opposite directions on the Amite River. The point of impact was in a curve some one-half to three-quarters

of a mile downstream from the French Settlement bridge. The bass boat was proceeding northward and apparently made a left turn into the path of the southbound ski boat.

As outlined by the trial judge in his opinion (at 470 F.Supp. 699, 700), the following facts are undisputed:

(1) One boat was used for pleasure boating, such as boat riding and water skiing, and at the time of the accident the boat was actually pulling a skier on a zip sled;

(2) The other boat was used exclusively for pleasure fishing and was described as a bass boat;

(3) Neither boat had ever been used in any "commercial maritime activity" before the accident;

(4) At the time of the accident neither boat was involved in any "commercial maritime activity" of any sort;

(5) Neither of the two drivers of the boat were being paid to operate the boat nor was this activity in any way part of their regular type of employment;

(6) None of the passengers on either boat were engaged in any kind of "traditional

maritime activity" either before or at the time of the accident;

(7) Neither of the boats involved were under hire in any traditional maritime form;

(8) There is no evidence to indicate that any "commercial activity", even in the broadest admiralty sense, had ever been previously engaged in by either of the boats in question, and in fact the two boats would have to be classified as "purely pleasure craft", not in any way "involved in commerce"; and,

(9) There was no other instrumentality involved in this accident that had even a minor relationship to "admiralty" or "commerce", i.e. a buoy, barge, oil drilling appartus, etc. Appendix "B" at pp. 9a-10a.

Respondents brought an action to recover for the collision between these two pleasure boats. The United States District Court for the Middle District of Louisiana dismissed for want of admiralty jurisdiction and the plaintiffs (respondents) appealed. The Fifth Circuit Court of Appeals reversed the District Court decision and remanded for consideration of the case on the merits. Petitioners' application for rehearing was denied and, from this decision, petitioners have filed this petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

REASONS FOR GRANTING THE WRIT

When an accident involving one or more vessels occurs on or in a navigable body of water and involves purely pleasure boats in which there is not the slightest scintilla of "commercial" activity involved, then the admiralty jurisdiction of the federal court should not be invoked. This conclusion and the advisability of granting a writ of certiorari are supported by the following reasons and authorities.

I.

The Law Of Admiralty Is Specially Designed For The Shipping Industry, Not Small Pleasure Boats, And A Significant Relationship To Traditional Maritime Commerce For Purposes Of Admiralty Jurisdiction Is Met Only When The Persons Or Events Involved Have Some Connection To Commerce.

The admiralty jurisdiction of the federal courts derived from the conviction of the members of the Constitutional Convention that there was a need for a uniform body of laws, in general harmony with the laws of other maritime nations, for the conduct of the shipping business. Thirteen separate bodies of laws were thought quite unacceptable for the governance of international trade. Regulation of the shipping industry was close to the conduct of foreign affairs, and

those engaged in the industry were thought to have a need of predictability for their rights and liabilities.[1] The admiralty jurisdiction was created to serve commercial shipping interests by providing a uniform body of law for the resolution of legal disputes arising among those engaged in it.

Prior to *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972), the general rule concerning maritime torts had been that "the jurisdiction of the admiralty is exclusively dependent upon the locality of the act." 409 U.S. at 253, 93 S.Ct. at 497, quoting from *Thomas v. Lane*, 23 F.Cas. pp. 957, 960, No. 13,902 (C.C.Me. 1813). But, as this Court noted as early as 1850, admiralty scholars had suggested that maritime locality alone was insufficient basis for admiralty jurisdiction. In recent times, several lower federal courts, including the Fifth Circuit, have held that a nexus with maritime commerce is an additional requirement for the invocation of admiralty jurisdiction. *Kelly v. Smith*, 485 F.2d 520 (5th Cir. 1973); *Adams v. Montana Power Co.*, 528 F.2d 437 (9th Cir. 1975); *Chapman v. United States*, 575 F.2d 147 (7th Cir. 1978).

Justice Stewart, for a unanimous Court in *Executive Jet*, held that locality alone was not a sufficient basis to

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1 The history is traced in Stolz, *Pleasure Boating and Admiralty, Erie at Sea*, 51 Cal.L.Rev. 661, particularly 666 et seq. and in Chapter 1 of Gilmore and Black, *The Law of Admiralty* (2nd Edition).

invoke the admiralty jurisdiction of the Court. While the facts of that case involved an airplane crash, and the actual holding was so restricted, much of the opinion discussed this Court's dissatisfaction with the locality alone test as a basis for admiralty jurisdiction in all tort actions.

Justice Stewart frequently cited Professor Moore's scholarly treatise on admiralty for reasons to support the additional requirement of establishing a significant relationship with maritime commerce. The reasons for this requirement were explained in *Executive Jet*, and more specifically in the following passage from Professor Moore:

> "The only valid criterion of the admiralty jurisdiction is the relation of the matter — whether it be tortious or contractual in nature — to *maritime commerce* . . . Location is often irrelevant. What is relevant and does justify the continued existence of separate maritime laws and procedures are the practical realities of the situation and the overriding goal of perpetuating the vitally important maritime industry. The maritime industry is still, to a large extent, transient, far-flung and fraught with perils. Those dealing with that industry — whether furnishing supplies, services, or shipping goods — are, consequently, entitled to remedies and defenses peculiarly fitted to

such ventures and should not be subjected to the idiosyncrasies of each port's local law. Similarly, because of the perils of the industry, those employed to man and operate vessels and who are injured as a result thereof are entitled to special and uniform laws especially designed to cover such occurrences. Such laws, not only assure the availability of a reasonably fair remedy to those connected or dealing with the maritime industry no matter where the injury or dispute may arise, but also give to all concerned — merchant, seaman and vessel owner — the ability to know in advance of the undertaking the rights and liabilities that will apply should some breach or disaster occur." 7A J. Moore, *Federal Practice, Admiralty*, ¶ .325(5), pp. 3606-3607 (2d Ed. 1976).

It becomes apparent that the law of admiralty is specially designed for the shipping industry, not small pleasure boats. Professor Black, also cited in *Executive Jet*, pointed out that the mention of the "admiralty and maritime jurisdiction" in Article III of the Constitution demonstrated "a strong federal interest in the orderly and uniform judicial governance of the concerns of the maritime industry." Black, *Admiralty Jurisdiction: Critique and Suggestions*, 50 Co. L.Rev. 259, 262 (1950). After a stinging criticism of the strict liability rule, Professor Black proposed that actions for tortious injury should be subject to the admiralty jurisdiction only when the

criterion of "real and substantial relation to shipping is met." Other scholars have joined in this analysis.

Professors Gilmore and Black state the following in their treatise: "If there is any sense at all in having a separate basis for admiralty jurisdiction in the federal courts, it must be because there is a federal interest that can best be implemented by thus dealing with the major concerns of the *shipping industry . . .*" *The Law of Admiralty*, Second Edition, pp. 27-28.

As the trial judge aptly stated in his opinion set forth at 470 F.Supp. 699, 703:

> "Admiralty jurisdiction was created to serve the commercial shipping industry's interests by providing a stable and constant body of law which is to be used in the resolution of litigation arising between those people actually engaged in it. The tremendous increase in the number of small pleasure boats, whether for skiing or pleasure fishing, is a contemporary problem. When the owners of these watercraft have absolutely no commercial or traditional maritime interest which requires the protection of the admiralty side of the federal judiciary, then admiralty jurisdiction should be withheld. In this context Professor Stoltz feels that the operation of small pleasure craft is so 'local' is nature that a uniform body of law is a detriment and that in-

stead, the jurisdiction of these cases should be transferred to the states. Professor Stoltz stated:

> '. . . where commerce stops, the need for uniformity also ends. If commerce is not involved, there is no national interest in uniformity and there is every reason associated with federalism for local power to govern events locally that have only local impact.' (*Pleasure Boating and Admiralty: Erie at Sea*, 51 Cal. L.R. p. 661)

Once again we see another commentator agreeing that when there is a complete lack of any commercial or traditional maritime connection, as in the case at bar, then admiralty jurisdiction should be withheld." Appendix "B" at pp. 18a-19a.

The great increase in the ownership and use of small pleasure craft is a modern phenomenon. Save for those in charter service, their owners and operators have no commercial interest to protect. Ships in foreign commerce or in the coastal trade move regularly from country to country or from state to state, but pleasure craft generally have a much narrower range. Those operated on lakes and waterways forming state boundaries may cross these boundaries with frequency, but many others will never be operated outside the state in which the owner resides. Their interstate contact, for

the average pleasure craft, is not likely to be greater than that of the average privately owned automobile.

If there be a continuing need for a relatively uniform body of laws for the governance of the commercial shipping industry, there is no such apparent need for the regulation of the operation of private pleasure craft aside from the Rules of the Road, laws and regulations relating to lights and the provision and maintenance of lifesaving equipment and similar matters. The Congress, by statute, and the Coast Guard, by regulation, can provide all of the uniform rules needed for the operation of small pleasure craft, but those can be interpreted and enforced by state courts as well as by federal judges. (The ability of state courts to handle pleasure craft litigation is more fully set forth in the third reason for granting the writ.)

Indeed Professor Stoltz views the operation of small pleasure craft as being so local in nature that a uniform body of laws is a positive detriment and that recognition of state court jurisdiction over these cases would be generously advantageous. 51 Cal. L.Rev. 666 et seq.

Three Circuit Court decisions, although admittedly only dealing with limiting the concept of "navigability" in admiralty to waters presently capable of sustaining commercial shipping, set forth additional reasoning that supports granting the writ of certiorari to consider a denial of jurisdiction in this case. The Eighth Circuit

in *Livingston v. United States*, 627 F.2d 165, 169 (8th Cir. 1980) stated that:

> "Federal admiralty jurisdiction had its genesis in the felt need to provide a uniform body of law governing navigation and commercial maritime activity. Admiralty law as a consequence, is concerned almost exclusively with the special needs of the shipping industry."

As the *Livingston* court noted, both the Ninth and Seventh Circuits had reached the same conclusion. In *Adams v. Montana Power Co.*, 528 F.2d 437, 439 (9th Cir. 1975) the Court observed that, absent some present or potential commercial activity, there is no ascertainable federal interest that justifies frustrating the legitimate interests of the states in providing a forum and applying their law to regulate conduct within their borders. In *Chapman v. United States*, 575 F.2d 147 (7th Cir. (en banc), cert. denied, 439 U.S. 893, 99 S.Ct. 251, 58 L.Ed.2d 239 (1978), the Court expressly adopted the reasoning in *Adams*, holding that federal admiralty jurisdiction did not encompass a claim brought by the estate of a man who drowned in a river last used for commercial shipping in 1931.

As the majority in the Circuit Court panel decision of this case pointed out, in Footnote 10 of the *Chapman* decision, that Court said:

> "The reach of admiralty jurisdiction over pleasure boat mishaps occurring in navigable waters used for commercial activity is, of course, not before us." 575 F.2d at 150, n. 10.

However, this note only serves to emphasize the necessity of reviewing this case for two particular reasons.

First, as Justice Thornberry concluded in his dissenting opinion to the Circuit Court's panel decision, in light of the *Chapman* and *Adams* decisions, this case should *at least* be remanded for a finding on whether the stretch of the Amite River where the accident occurred functioned as an artery of commerce. The majority of the panel found it unnecessary to answer this question, even though it could well be determinative of the jurisdictional issue in this case. Furthermore, the majority even recognized that the Amite River where the accident occurred was seldom, *if ever*, used for commercial activity. (641 F.2d 314, 317 in Appendix "A" at p. 7a.)

Second, as the next argument sets forth, the jurisdictional issue presented by the facts of this case poses an important question of federal law which has not been, but should be, clearly answered by this Court. Furthermore, by refusing to deny jurisdiction in this case, the Fifth Circuit has extended the scope of admiralty jurisdiction beyond that previously set forth by that Circuit in the case of *Kelly v. Smith*, 485 F.2d 520 (5th Cir. 1973). The advisability of such an extension from

precedent constitutes an additional issue that should be settled by this Court by writ of Certiorari.

II.

A Decision By This Court Is Necessary To Clearly Settle The Question Of Whether The Admiralty Jurisdiction Of The Federal Courts Should Be Extended To Accidents Occurring Between Purely Recreational Boats With No Commercial Connections.

As outlined in the first reason, a strong case exists for the denial of admiralty jurisdiction in controversies such as this one arising out of the operation of small pleasure craft where no commercial activity is involved. However, even though some lower courts have recognized the convincing argument supporting such a restriction on the admiralty jurisdiction, these courts have continued to extend jurisdiction over pleasure boat cases based on implications from and assumptions about the *Executive Jet* case, supra, this Court's most recent decision touching on the issue. *Richards v. Blake Builders Supply, Inc.*, 528 F.2d 745, 748 (4th Cir. 1975).

The lower courts have relied on three early cases prior to *Executive Jet* for this Court's latest opinion on the pleasure boat issue. In *Levinson v. Deupree*, 345 U.S. 648, 97 L.Ed. 1319, 73 S.Ct. 914, a wrongful death action arising out of a collision of two motor boats on the Ohio River was treated as being in admiralty. There was no discussion of the question of whether the admiralty

jurisdiction extended to the controversy. The answer was assumed to be resolved. Even if this case could be considered to have resolved the pleasure boat issue, it is easily distinguishable from the case at bar, since the Amite River is certainly not a commercial artery like the Ohio River.

In *Just v. Chambers*, 312 U.S. 383, 85 L.Ed. 903, 61 S.Ct. 687, and *Coryell v. Phipps (The Seminole)*, 317 U.S. 406, 63 S.Ct. 291, 87 L.Ed. 363, this Court dealt with limitation of liability proceedings by owners of pleasure boats. In *Just*, the claim was denied because the fault was within the privity or knowledge of the owner. In *Coryell*, it was allowed. In neither case did this Court analyze or discuss the jurisdictional issue; the Court's attention was simply focused upon the application of the limitation of liability rule. Furthermore, in the *Coryell* case, the Seminole (boat) had been engaged in commerce, subject to charter. 39 F.Supp. 142. In the case at bar, the trial judge found as undisputed fact that neither of the boats involved had any connection to commerce, nor were they under charter. 470 F.Supp. 699, 700, in Appendix "B" at pp. 9a-11a.

Thus, even if *Executive Jet* did not question the holdings of any of these three earlier cases, none of these cases clearly settles the jurisdictional question in this case. A forthright analysis of the pleasure boat problem is necessary for two reasons. First, the lower courts should not be forced to rely on mere implications from

old decisions. A conclusive opinion reached after a careful analysis of the jurisdictional issues and ramifications would be much better authority for the lower courts to follow in making important case decisions. Second, as indicated in the first section of argument, several noted authorities agree that admiralty jurisdiction should not be extended over pleasure boat cases with no connection to the commercial shipping industry.

For these reasons, and also as indicated in this Court's Rule 17.1(c), the writ of certiorari should be granted to settle this important jurisdictional question. The advisability of granting the writ is further emphasized by the potential impact of the Fifth Circuit's decision in this case.

In *Kelly v. Smith*, 485 F.2d 520 (5th Cir. 1973), the Fifth Circuit preserved a link between admiralty jurisdiction and commercial activity which its decision in this case would completely sever. In *Kelly*, the Fifth Circuit also recognized the absurdity of applying the "strict locality test," and stated:

> "The analysis and thrust of *Executive Jet*, coupled with our decision in Peytavin, dictate the conclusions that maritime locality alone is no longer sufficient to sustain maritime jurisdiction, and that the wrong must bear a significant relationship to maritime activity." 485 F.2d at 524.

In this case, the panel majority "regretfully concluded" that precedent did not permit them to take the "far reaching step" of denying admiralty jurisdiction in this case. The panel also stated that the *Kelly* decision, among others, "unquestionably" controlled their decision in this case. (641 F.2d 314, 315, in Appendix "A" at pp. 2a & 3a.) However, a careful analysis of the *Kelly* decision indicates that it was actually the panel who was taking a "far-reaching step" from precedent by reversing the district court's decision.

The Circuit Court in *Kelly* stated that it must "look to all the circumstances for a substantial maritime relationship. Both *Peytavin* and *Executive Jet* offer guidelines for the determination." (485 F.2d at 525) The Court then went on to list certain factors in *Kelly* which caused it to invoke admiralty jurisdiction: "The functions and roles of the parties; the types of vehicles and instrumentalities involved; the causation and the type of injury; and traditional concepts of the role of admiralty law." (Id.) With this analysis, the Court concluded that "policy militates toward admiralty jurisdiction in this case." (Id.)

As the District Court Judge observed, it is not clear how much of the "policy" involved in *Kelly* dealt with the fact that the plaintiffs would have been barred due to the running of the applicable state prescriptive period as opposed to the doctrine of laches used in admiralty. However, it did play some part. (470 F.Supp. at p. 702, in Appendix "B" at p. 17a). The prescription versus laches argument is not present in the instant case

since suit was filed well before one year elapsed from the date of the accident.

In support of this petition, it is important to note that the *Kelly* decision preserved a link with commercial activity that the lower court decision in this case would completely sever. The discussion in the *Kelly* case indicated that there was at least some commercial activity present to invoke admiralty jurisdiction. The case dealt with what might be termed a "piracy" on the Mississippi River. The Circuit Court justified its decision in *Kelly* as follows:

> "Rifle fire directed at a vessel, albeit a small one, *on a major commercial artery*, and injuring the pilot, presents sufficient danger to *maritime commerce* for the federal courts of admiralty to assume jurisdiction and to furnish remedies to those aboard the vessel and injured by that conduct." 485 F.2d at 526 (emphasis added)

There is no indication in this case that the incident in question created any such "danger to maritime commerce" and thus no federal interest is at stake in this case. Furthermore, the accident did not occur on a commercial artery.

The lower court contends that its decision to extend jurisdiction to the facts of this case would promote uniformity. As already outlined above, in this case where no maritime commercial activity is involved, these is no

need for a uniform body of federal law to regulate the disputes of pleasure boaters. *Admiralty: Erie at Sea*, 51 Ca. L.R. p. 661.

In any event, if uniformity is the goal, the best way to achieve it is for this Court to grant the writ of certiorari and take this opportunity to establish a clear-cut uniform rule to deal with pleasure boat cases. As indicated above, this Court has never issued an analysis of this jurisdictional issue. Despite the absence of a definite ruling by this Court, the lower courts have continued to rely on mere implications and assumptions in rejecting the well reasoned arguments in favor of not extending admiralty jurisdiction to these cases. Before these arguments are rejected, they should first be presented to this Court for its consideration.

We suggest that a review of all the post *Executive Jet* cases cited clearly establishes a simple workable rule for determining the applicability of maritime jurisdiction in pleasure boating cases. The test of jurisdiction dictates a balancing of location with commercial nexus. As one approaches the shore and moves inland, the complained of conduct must have a closer connexity with maritime commerce in order to support admiralty jurisdiction. Viewed in this light, every case, including *Kelly v. Smith*, fits into an orderly pattern. As location becomes less relevant to maritime commerce, the activity complained of must have a closer relationship to such commerce. (Commercial) Conduct + (Commercial) Location = Admiralty Jurisdiction.

Even if this test were found to be nebulous, the test applied by the District Court in this case would provide a viable alternative. The District Court said that when a court considers whether or not to extend admiralty jurisdiction to a case involving purely pleasure crafts, the following guidelines would aid in determining the jurisdictional question:

> (1) Was the boat(s) involved being used for a purely pleasure type operation;
>
> (2) Has the boat(s) involved ever been previously used in any type of commercial or maritime operation;
>
> (3) Was the driver of the boat(s) under hire;
>
> (4) Were any of the passengers under hire to perform any traditional maritime function;
>
> (5) Was there any instrumentality of commercial or maritime connection involved in any way with the accident;
>
> (6) Are there any policy considerations involved which should encourage the court to find in favor of admiralty jurisdiction; and/or
>
> (7) Are there any traditional concepts or modern applications of the role of admiralty which could be involved that would invoke admiralty jurisdiction.

(470 F.Supp. 699, 704, in Appendix "B" at pp. 20a-21a.)

The District Court acknowledged that had any one of these questions been answered affirmatively in the case at bar, then that fact, coupled with the location of the accident, might have been sufficient to invoke the admiralty jurisdiction of the Federal Court. However, in this case, all the answers to the listed questions were in the negative (except for #(1), of course).

Regardless of the form chosen, there is an obvious need for a definite jurisdictional test in pleasure boat cases. For this reason, a decision by the Court on writ of certiorari is necessary to clearly settle the question of whether the admiralty jurisdiction of the federal courts should be extended to accidents occurring between purely recreational boats with no commercial connections.

III.

There Is An Adequate Body Of State Law Available To Resolve Controversies Such As This In The State Courts, Without Burdening The Federal Courts.

The states are capable of resolving litigation arising from the collision of two pleasure boats out of their existing bodies of laws. The lower court believed that admiralty jurisdiction should be invoked merely because the federal rules of the road were involved in this dispute. However, while the federal rules of the road must be applicable to the operation of small pleasure craft in

navigable waters, there is no impediment to the application of those requirements by the state courts. *Crosson v. Vance*, 484 F.2d 840, 841 (4th Cir. 1973); *Richards v. Blake Builders Supply, Inc.*, 528 F.2d 745, 747 (4th Cir. 1975).

State courts are not only allowed but are mandated to enforce federal statutes relating to navigation and are to give those rules the same construction as they are given by the federal courts sitting in admiralty. *Carlin v. New York N.H. & H.R. Co.*, 1911, 130 N.Y.S. 828; *Chesley v. Nantasket Beach Steamboat Co.*, 1901, 61 N.E. 50, 179 Mass. 469; 33 U.S.C.A. §154.

The lower court majority recognized that the record in this case indicated that the Amite River, where the collision occurred, was seldom *if ever* used for commercial activity. (641 F.2d 314, 316, in Appendix "A" at p. 6a). As previously mentioned, the Ninth Circuit in *Adams v. Montana Power Co.*, 528 F.2d 437 (9th Cir. 1975) held that admiralty jurisdiction did not extend to a tort claim arising in waters "traversed" by small pleasure craft only, "where no commercial shipping occurred or was likely to occur." The court also found that application of federal law on waters devoid of trade and commerce would only serve to burden the federal courts and frustrate the purpose of state tort law. This reasoning was adopted by both the Seventh and Eighth Circuits in the *Chapman* and *Livingston* cases cited above.

If the lower court's decision is maintained, the penumbra of this decision would only serve to interject admiralty law complexities into litigation easily resolved by existing, often more modern state laws. Pleasure boat collisions without any commercial connection would then involve such notions as major-minor fault, active/passive negligence, divided damages in collision, and limitation proceedings. For this reason, review by this Court is advisable before the interjection of these complexities is allowed. The complexity can be avoided since state laws provide adequate remedies and procedures for settlement of disputes like this one, arising from local, intra-state, small boat accidents that have no connection with the maritime industry.

CONCLUSION

Since this case involves two pleasure boats without any connection to maritime commerce, the admiralty jurisdiction of the federal court should not be invoked. The lower court reversed the district court's judgment and found jurisdiction over this controversy despite the well reasoned arguments for not extending admiralty jurisdiction to such disputes. The only "authority" for this extension was assumed and implied from this Court's decision in *Executive Jet* and three earlier cases distinguished from the facts of this case. Since none of these cases clearly analyzed or disposed of the important jurisdictional question presented in this case, pursuant to this Court's Rule 17.1(c) this petition for writ of certiorari should be granted, the deci-

sion of the lower court reversed, and the judgment of the trial court reinstated, dismissing this case for lack of jurisdiction.

Respectfully submitted,

ARTHUR HOWELL ANDREWS
Attorneh of Record
FRANKLIN, MOORE & WALSH
501 Louisiana Avenue
Post Office Box 3958
Baton Rouge, Louisiana 70821
(504) 383-2608

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit have been served on the Honorable Roy Maughan, counsel of record for respondents, Pansy F. Richardson, Donald B. Richardson, Patrick S. Richardson, Joseph S. Richardson, Larry S. Richardson, and Carla Richardson and on the Honorable Victor Marcello, counsel of record for June G. Allen by depositing said copies in the U.S. mail, postage prepaid, this ____day of June, 1981.

I further certify that all parties required to be served have been served.

ARTHUR H. ANDREWS

APPENDIX "A"

Pansy F. RICHARDSON, Donald B. Richardson, Patrick S. Richardson, Joseph S. Richardson, Larry S. Richardson, and Carla Richardson, Plaintiffs-Appellants-Cross Appellees,

v.

FOREMOST INSURANCE COMPANY, Shirley Eliser and June G. Allen, Defendants-Appellees,

June G. Allen, Defendant-Appellee-Cross Appellant.

No. 79-2542.

United States Court of Appeals, Fifth Circuit.

April 2, 1981.

Appeals from the United States District Court for the Middle District of Louisiana.

Before THORNBERRY, ANDERSON and THOMAS A. CLARK, Circuit Judges.

THOMAS A. CLARK, Circuit Judge:

This is an appeal from the dismissal of plaintiffs' complaint on the ground that it did not state a cause of

action that was within the admiralty jurisdiction of the lower court. The incident giving rise to the complaint involved a collision between two pleasure boats on the upper reaches of the Amite River. The district court, 470 F.Supp. 699, reasoned that the facts of the case did not present a sufficient relationship to traditional maritime activity to warrant the extension of admiralty jurisdiction to this litigation. While there is much logic and good sound policy reasons that support the district court's holding, we regretfully conclude that precedent does not permit us to take this far-reaching step. Additionally, there is uniformity in the present rule that admiralty jurisdiction extends to all accidents occurring between surface vessels on navigable waters. The benefits derived from this certainty override the policy considerations advanced by the appellees in support of the district court's ruling.

The accident giving rise to this litigation was between one pleasure boat being used to pull a skier on a "zip sled" and a pleasure boat used for sportfishing but under way at the time. Neither boat had ever been involved in commercial maritime activity. There was no involvement at the time of the accident of any buoy, barge, or underwater obstruction.

The district court concluded that there was a lack of admiralty jurisdiction and defined the issue as follows:

> In short, this case squarely presents the factual issue of whether or not "admiralty

jurisdiction" must be extended to an accident occurring between two pleasure boats in the purest sense of the word, and in which there is absolutely no "commercial" or "traditional maritime activity" whatsoever involved.

The district court referred to the views of certain text writers in the field[1] and then examined and relied on three cases that unquestionably control the decision of this case, those being *Executive Jet Aviation, Inc. v. City of Cleveland, Ohio*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972), *Kelly v. Smith*, 485 F.2d 520 (5th Cir. 1973), and *Peytavin v. Government Employees Insurance Co.*, 453 F.2d 1121 (5th Cir. 1972).

Those three cases very simply may be said to hold that admiralty jurisdiction requires more than the occurrence of the tort on navigable waters — that additionally there must be a significant relationship between the wrong and traditional maritime activity. Thus, we agree with the district court in the statement of the rule. We differ from the district court in the application of the rule to the facts in this case.

We hold that two boats, regardless of their intended use, purpose, size, and activity, are engaged in traditional maritime activity when a collision between them occurs on navigable waters. We say this because

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1 Gilmore and Black, *The Law of Admiralty*, 2d ed., 1975; Benedict on Admiralty, 7th ed. (Revised); and, Boland and Dodd, *Recent Developments in the Law of Maritime Torts* (1972).

boats, regardless of their size, purpose, and activity, are governed by the same "Rules of the Road" as the largest seagoing vessel when those boats are traversing navigable waters. As such, the owners and operators of the vessels are bound by those rules, and their negligent operation or absence of negligent operation is so governed. We do not find that any of the three cases which are our guideposts require that the maritime activity be an exclusively commercial one. We sympathize with those writers and scholars who strongly believe that admiralty jurisdiction should be limited to only litigation involving commercial activity on navigable waters. We recognize that the Fourth Circuit in *Crosson v. Vance*, 484 F.2d 840 (4th Cir. 1973), holds otherwise than we do here. We note that the Eighth Circuit in *St. Hilaire Moye v. Henderson*, 496 F.2d 973 (8th Cir. 1974), has held that admiralty jurisdiction does extend to an accident identical to this. The Seventh Circuit in *Chapman v. United States*, 575 F.2d 147 (7th Cir. 1978), held that admiralty jurisdiction did not extend in that case because the once navigable waterway is now used only for recreational activities. In footnote 10 the court said: "The reach of admiralty jurisdiction over pleasure boat mishaps occurring in navigable waters used for commercial activity is, of course, not before us." 575 F.2d at 150, n. 10.

Our decision in this case is strongly influenced by the holding in *Kelly v. Smith, supra*, in which this court stated that "[a]dmiralty has traditionally been concerned with furnishing remedies for those injured while

traveling navigable waters." *Id.* at 526. That case dealt with an unusual factual situation where gunfire was exchanged between occupants of a pleasure boat on the Mississippi River and persons standing on an island. The court placed emphasis on the danger presented by gunfire being directed at a vessel, although a small one, on a major commercial artery. We note a strong dissent in that case by Judge Morgan but believe that the facts in this case are more closely related to traditional maritime activities than those in the *Kelly* case because the rules governing navigation of all vessels govern the operation of the boats involved in the collision in this case.

If we were to hold that admiralty jurisdiction did not reach this litigation, we would be injecting an uncertainty that would plague litigants and the courts. For example, in the case of non-commercial navigators traveling on navigable waters that are shared by more than one state, their obligations and duties would be subject to differing standards depending on their precise location within the territorial jurisdiction of one state or another. Moreover, non-commercial navigators everywhere would be subject to yet another conflict in applicable standards of behavior depending upon whether their activity later turns out to be sufficiently "commercial," and, therefore, solely a matter for the states. Only a uniform admiralty law, extending to non-commercial as well as commercial navigators, avoids these problems.

We note additionally from the record that the place where the accident occurred is seldom, if ever, used for commercial activity. That does not cause us to vary from our holding. The waterway is not landlocked. It would be introducing another note of uncertainty to hold that admiralty jurisdiction extends only to a stretch of navigable water that presently functions as a commercial artery. Jurisdiction should be a readily ascertainable as courts can make it. If the waterway is capable of being used in commerce, that is a sufficient threshold to invoke admiralty jurisdiction.

We remand to the district court for consideration of the case on the merits..

REVERSED and REMANDED.

THORNBERRY, Circuit Judge, concurring in part; dissenting in part:

Admiralty jurisdiction does not encompass actions in tort unless the wrong occurs on navigable waters and bears a significant relationship to traditional maritime activity. *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972); *Kelly v. Smith*, 485 F.2d 520 (5th Cir. 1973). The district court in this instance found it unnecessary to reach the navigability issue, since it found the "traditional maritime activity" criterion dispositive of the case. Although I am sympathetic with that court's conclusion that pleasure boating is not the stuff of which ad-

miralty jurisdiction should be made, the question is no longer open for us to decide, since this Court has held that noncommercial activity does fall within the ambit of admiralty jurisdiction. *Kelly, supra.*

It is important to note, however, that the *Kelly* decision preserved a link (though certainly a weak one) with commercial activity that the majority in this case severs completely. The Court justified its decision in *Kelly* as follows:

> Rifle fire directed at a vessel, albeit a small one, *on a major commercial artery,* and injuring the pilot, presents sufficient danger *to maritime commerce* for the federal courts of admiralty to assume jurisdiction and to furnish remedies to those aboard the vessel and injured by that conduct.

Id. at 526 (emphasis added). In contrast, there is no hint in the case before us that the tort created a similar "danger to maritime commerce" and thus no trace of *any* federal interest at stake in this case. Because I believe that the desire for certainty cannot alone justify the assumption of federal control over matters of purely local concern, I would remand for a finding on whether the stretch of river where the accident occurred functions as an artery of commerce. *See Chapman v. United States,* 575 F.2d 147, 151 (7th Cir. 1978) (en banc); *Adams v. Montana Power Co.,* 528 F.2d 437 (9th Cir. 1975). Since the majority finds it unnecessary to answer this question, I respectfully dissent.

APPENDIX "B"

Pansy F. RICHARDSON, Donald B. Richardson, Patrick S. Richardson, Joseph S. Richardson, Larry S. Richardson, and Carla Richardson

v.

FOREMOST INSURANCE COMPANY, Shirley Eliser and June G. Allen.

Civ. A. No. 76-280.

United States District Court, M.D. Louisiana.

May 23, 1979.

E. GORDON WEST, District Judge:

The sole issue before the court is whether or not, under the admitted facts in this case, this court is vested with "admiralty jurisdiction." The incident giving rise to this litigation involved a collision between two "pleasure" boats. One was an eighteen foot pleasure boat powered by a 185 h.p. Johnson outboard motor that was being used for water skiing purposes at the time of the accident. The other was a sixteen foot "bass boat" powered by an outboard motor that was used exclusively for pleasure fishing. At the time of the accident the two boats were headed in opposite directions on the Amite River. The point of impact was in a curve

some one-half to three-quarters of a mile downstream from the French Settlement bridge. The bass boat was proceeding northward and apparently made a left turn into the path of the southbound ski boat.

Assuming, for the purpose of this opinion, that the Amite River, at the point of collision, is "navigable", the dispositive issue, in this case, is whether or not there is a "sufficient relationship to traditional maritime activity" to warrant the extension of admiralty jurisdiction to this litigation.

For the reasons hereinafter set forth, we conclude that under the facts of this case this court is not vested with admiralty jurisdiction.

The following facts are undisputed:

(1) One boat was used for pleasure boating, such as boat riding and water skiing, and at the time of the accident the boat was actually pulling a skier on a zip sled;

(2) The other boat was used exclusively for pleasure fishing and was described as a bass boat;

(3) Neither boat had ever been used in an "commercial maritime activity" before the accident;

(4) At the time of the accident neither boat was involved in any "commercial maritime activity" of any sort;

(5) Neither of the two drivers of the boat were being paid to operate the boat nor was this activity in any way a part of their regular type of employment;

(6) None of the passengers on either boat were engaged in any kind of "traditional maritime activity" either before or at the time of the accident;

(7) Neither of the boats involved were under hire in any traditional maritime form;

(8) There is no evidence to indicate that any "commercial activity", even in the broadest admiralty sense, had ever been previously engaged in by either of the boats in question, and in fact the two boats would have to be classified as "purely pleasure craft", not in any way "involved in commerce"; and,

(9) There was no other instrumentality involved in this accident that had even a minor relationship to "admiralty" or "commerce", i.e. a buoy, barge, oil drilling apparatus, etc.

In short, this case squarely presents the factual issue of whether or not "admiralty jurisdiction" must be extended to an accident occurring between two pleasure boats in the purest sense of the word, and in which there is absolutely no "commercial" or "traditional maritime activity" whatsoever involved.

In our analysis it must first be noted that some of the most respected admiralty commentators lean heavily toward the stand now taken by this court that this particular case is not one which was meant to be covered by the admiralty jurisdiction of the federal courts.

Professors Gilmore and Black state the following in their treatise, *The Law of Admiralty*, Second Edition:

> "The following are doubtful areas, (for invoking admiralty jurisdiction) where generalization is dangerous:
>
> > Torts occurring on navigable waters, but having no other maritime connection." (*The Law of Admiralty*, Second Edition, pp. 27, 28; parenthesis added)

However, Professors Gilmore and Black do not stop here. Their treatise contains numerous quotes aimed at the very heart of this case at bar; such as:

> "In the main, the outlines of the jurisdiction seem to have been pretty well drawn. Its evaluation requires the balancing of two fac-

tors pulling in opposite directions. First, if there is any sense at all in having a separate basis for admiralty jurisdiction in the federal courts, it must be because there is a federal interest that can best be implemented by thus dealing with the major concerns of the *shipping industry* — with all of them, and not just with a few of them selected on antiquarian criteria."

"Whether a given inclusion within or exclusion from the jurisdiction is warranted must depend on the general sense and policy of having the jurisdiction at all. It is hard to think of any better reason for having this jurisdiction than its aptness for providing a special-industry court for the *maritime industry*. If this is right, then some modern decisions wander far off the mark. One thinks of the cases bringing airplane accidents within the jurisdiction, just because the plane happens to crash on navigable waters, and the inclusion of such mishaps as surfboard accidents, or *motorboat accidents* on lakes substantially landlocked. *Happily, these cases have* (to some not yet certain extent) *been overruled, at the highest level. It may be hoped that this overruling is thoroughly general . . . Ideally, the jurisdiction out* (sic) *to include those and only those things principally connected with maritime transportation. Summarily, the lower courts have been over-inclusive as to torts,* and under-inclusive as to

contracts." (*The Law of Admiralty*, Second Edition, pp. 29-31; emphasis added)

Benedict on Admiralty, Seventh Edition (Revised), is another important treatise in which several selected quotes would strongly indicate that the particular facts in this case do not merit the extension of admiralty jurisdiction:

> ". . . maritime law is not a monistic system. Where, although a matter is maritime, there may be overwhelming considerations requiring state regulation and if such state law does not disturb the general uniformity of maritime law, its application to cases 'maritime but local' will be valid. It is not always easy in borderline cases to determine how the accommodation between state and federal concern should be made. One distinction appears to be that where obligations are imposed by virtue of the authority of state or Federal government, the court must attempt to balance the interests, but where the obligations are assumed voluntarily, as in a contract, they ought to be judged by the law applying to the real nature of the transaction." (*Benedict on Admiralty*, Seventh Edition (Revised) Section 127, pp. 8-47 thru 8-49)

Louisiana, with its roots sunk deeply into the maritime arena, has been one of the leading states in

the molding and shaping of the constraints of admiralty jurisdiction. In a recently published book on this subject several noted Louisiana attorneys spoke about the factual situation which now presents itself to this court:

> "The second constructive reduction of the admiralty jurisdiction is the *requirement of a maritime connection along with the locus of the accident to support maritime jurisdiction. . . .* The court mentioned that in the Fifth Circuit's decision in *Watts v. Zapata Offshore Co.*, it had been said that only minimal maritime connection was required once you had the sufficient maritime locus.
>
> "What, then, were the considerations of whether there was sufficient maritime connection for this accident? The *Prytarin* court, in finding there was not sufficient maritime connection in that case pointed out that neither the parties, nor the nature, nor the apparent cause of the accident, nor the injury sustained demonstrated any further connection with maritime interests. It is necessary to keep in mind what considerations are involved in the determination of "maritime connections."
>
> "As a result, *now not only do you have to have the locus, you need the pure maritime connection for admiralty jurisdiction.*

> "The district courts are going to have a struggle too, because it would appear that they must now come to grips with something previously unheard of: *maritime connexity as an adjunct to the locus theory.*" (Recent Development in the Law of Maritime Torts, edited by Boland and Dodd; pp. 22-26 (1972))

The foregoing analysis leads us directly to two cases which must be closely examined by this court. *Executive Jet Aviation, Inc. v. City of Cleveland, Ohio*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454, 1973 AMC 1 (1972); and *Kelly v. Smith*, 485 F.2d 520, 1973 AMC 2478 (CA 5-1973).

In *Executive Jet* the United States Supreme Court recognized the time honored rule that the "locality" of the wrong was traditionally the deciding point in whether or not admiralty jurisdiction was present. However, in an in-depth review of prior jurisprudence the court recalled some serious difficulties with the blind application of the locality test. Based on this the court stated:

> "In sum, there has existed over the years a judicial, legislative, and scholarly recognition that, in determining whether there is admiralty jurisdiction over a particular tort or class of torts, reliance on the relationship of the wrong to traditional maritime activity is often more sensible and more consonant with the purposes of maritime law than is a purely

mechanical application of the locality test." (93 S.Ct. at 501)

Of course, *Executive Jet* dealt with an aircraft accident. This is not the situation in the case at bar. However, the principles of *Executive Jet*, and more importantly its progeny, will have an impact on this case.

Likewise, in *Kelly v. Smith*, supra, the Fifth Circuit recognized the absurdity of applying the "strict locality test", and stated:

> "The analysis and thrust of *Executive Jet*, coupled with our decision in *Peytavin*, dictate the conclusions that maritime locality alone is no longer sufficient to sustain maritime jurisdiction, and that the wrong must bear a significant relationship to maritime activity." (485 F.2d at 524)

The court in *Kelly* was steadfast in adhering to a policy whereby some significant relationship to a recognized maritime activity was required before admiralty jurisdiction would be invoked. (see generally 485 F.2d at 524).

With these two cases as a backdrop, our examination continues with the "locality plus" test that was discussed in *Kelly v. Smith*, supra. The court in *Kelly* stated that it must "look to all the circumstances for a substantial maritime relationship. Both *Peytavin* and *Executive Jet*

offer guidelines for the determination." (485 F.2d at 525) The court then went on to list certain factors in that case which caused it to invoke the admiralty jurisdiction:

> "From the facts and analysis of *Executive Jet* and *Peytavin* we can discern factors to be considered in the circumstances before us: the functions and roles of the parties; the types of vehicles and instrumentalities involved; the causation and the type of injury; and traditional concepts of the role of admiralty law." (485 F.2d at 525)

The Fifth Circuit concluded its analysis with the statement that: "Policy militates toward admiralty jurisdiction in this case." (485 F.2d at 526) It is not clear how much of the "policy" involved dealt with the fact that the plaintiffs in *Kelly* would have been barred due to the applicable state prescriptive period as opposed to the doctrine of laches used in admiralty. However, it did play some part. (see generally 485 F.2d at 526) The prescription versus laches argument is not present in the instant case since suit was filed well before one year elapsed from the date of the accident.

Most importantly to this case, the discussion in the *Kelly* case indicated that there was either some "commercial activity" or some "traditional maritime connection" present to invoke admiralty jurisdiction. It seems clear from the facts in *Kelly* that the case dealt, at least to some degree, with what this court might term

"piracy" in that the plaintiffs were admittedly poaching on the land which the defendant, J. C. Smith, had been hired to protect.

When the location of the injury is on or in a navigable waterway, the requirement of a "traditional maritime connection" becomes less stringent. In *Kelly v. Smith*, supra, the poaching or piracy, with its commensurate miniwar between the parties in a stretch of the Mississippi River which is conclusively navigable, was enough to trigger the admiralty jurisdiction of the federal court. However, in the case at bar this court can find no "traditional maritime connection" between the injuries received and the location of the tort. Admiralty jurisdiction was created to serve the commercial shipping industry's interests by providing a stable and constant body of law which is to be used in the resolution of litigation arising between those people actually engaged in it. The tremendous increase in the number of small pleasure boats, whether for skiing or pleasure fishing, is a contemporary problem. When the owners of these watercrafts have absolutely no commercial or traditional maritime interests which require the protection of the admiralty side of the federal judiciary, then admiralty jurisdiction should be withheld. In this context Professor Stoltz feels that the operation of small pleasure craft is so "local" in nature that a uniform body of law is a detriment and that instead, the jurisdiction of these cases should be transferred to the states. Professor Stoltz stated:

". . . where commerce stops, the need for uniformity also ends. If commerce is not involved, there is no national interest in uniformity and there is every reason associated with federalism for local power to govern events locally that have only local impact." (*Pleasure Boating and Admiralty: Erie at Sea*, 51 Cal.L.R. p. 661)

Once again we see another commentator agreeing that when there is a complete lack of any "commercial" or "traditional maritime connection", as in the case at bar, then admiralty jurisdiction should be withheld.

This court's decision that, in this particular type of case, there is no admiralty jurisdiction, is further bolstered by several other cases. At first blush each of these other cases might seem to indicate that this court is in error. However, upon a close examination it can be readily determined that in each of the factual situations some quality of "commerce" or "traditional maritime activity" was connected with the accident.

In *Kaiser v. Travelers Insurance Co.*, 359 F.Supp. 90 (E.D. La.-1973), the connection was the fact that the water skier hit a sunken barge. In *Gele v. Chevron Oil Company*, 574 F.2d 243 (CA 5-1978), the connection was that the pleasure boat collided with a sunken barge. And finally, in two cases brought before this court, *Butler v. Amoco Production Company* (CA No. 74-94) and *Langlois v. Dow Chemical Company*, (CA No. 78-402), we have extended

admiralty jurisdiction to cases in which the only connection was that each of the pleasure boats involved struck a pipe anchored to an old drilling rig which was a few inches under the water level in a bayou.

As can be seen from each of these cited cases, there was some "commercial" or "traditional maritime" connection, regardless of how small, which, when coupled with the location of the accident, could properly invoke the admiralty jurisdiction of a federal court. However, in the case at bar no such minimal connection exists and, based on the guidelines of *Peytavin* and *Executive Jet*, admiralty jurisdiction cannot be properly extended, regardless of the location of the accident.

Just as the court in *Kelly v. Smith*, supra, set forth a non-exclusive list of factors to be considered, this court also finds such a listing to be helpful. When a court considers whether or not to extend admiralty jurisdiction to a case involving purely pleasure crafts, the following list offers some guidelines to aid in the admiralty jurisdiction question:

(1) Was the boat(s) involved being used for a purely pleasure type operation;

(2) Has the boat(s) involved ever been previously used in any type of commercial or maritime operation;

(3) Was the driver of the boat(s) under hire;

(4) Were any of the passengers under hire to perform any traditional maritime functions;

(5) Was there any instrumentality of commercial or maritime connection involved in any way with the accident;

(6) Are there any policy considerations involved which should encourage the court to find in favor of admiralty jurisdiction; and/or

(7) Are there any traditional concepts or modern applications of the role of admiralty which could be involved that would invoke admiralty jurisdiction.

The list is merely illustrative of the type of indepth analysis which a court should undertake before deciding whether or not admiralty jurisdiction is present in a particular case involving one or more purely pleasure boats. In the case at bar all of the answers to the aforementioned list are in the negative. Had any one of them been in the affirmative, then that fact, coupled with the location of the tort, might be sufficient to invoke the admiralty jurisdiction of the federal court.

From the Laws of Oleron to *Executive Jet* the role of "admiralty jurisdiction" has undergone many a metamorphosis. It will probably continue to do so. This court finds that one metamorphosis which must be recognized is that when an accident involving one or more vessels occurs on or in a navigable body of water

and involves purely pleasure boats in which there is not the slightest scintilla of either "commercial" activity or "traditional maritime activity" involved, then the admiralty jurisdiction of the federal court should not be invoked.

Therefore, based on the foregoing factual and legal analysis it is the opinion of this court that plaintiff's claim cannot be maintained in admiralty. The plaintiff's suit will be dismissed.

Judgment will be entered accordingly.

APPENDIX "C"

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A & B

No. 79-2542

PANSY F. RICHARDSON, DONALD B. RICHARDSON, PATRICK S. RICHARDSON, JOSEPH S. RICHARDSON, LARRY S. RICHARDSON, CARLA RICHARDSON, and JUNE G. ALLEN,
Plaintiffs-Appellants-
Cross Appellees,

versus

FOREMOST INSURANCE COMPANY, SHIRLEY ELISER and JUNE G. ALLEN,
Defendants-Appellee,

JUNE G. ALLEN,
Defendant-Appellee-
Cross Appellant.

Appeals from the United States District Court for the Middle District of Louisiana

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion April 2, 1981, 5 Cir., 1981, 641 F.2d 314).

(May 4, 1981)

Before THORNBERRY, ANDERSON and THOMAS A. CLARK, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ THOMAS A. CLARK
United States Circuit Judge

Received: May 6, 1981

CLERK's NOTE:
See Rule 41 FRAP and Local Rule 17 for Stay of the Mandate

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNITS A & B

No. 79-2542

PANSY F. RICHARDSON, DONALD B. RICHARDSON, PATRICK S. RICHARDSON, JOSEPH S. RICHARDSON, LARRY S. RICHARDSON, and CARLA RICHARDSON,
Plaintiffs-Appellants-
Cross Appellees,

versus

FOREMOST INSURANCE COMPANY, SHIRLEY ELISER and JUNE G. ALLEN,
Defendants-Appellees,

JUNE G. ALLEN,
Defendant-Appellee-
Cross Appellant.

Appeals from the United States District Court for the Middle District of Louisiana

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ON PETITION FOR REHEARING

(May 4, 1981)

Before THORNBERRY, ANDERSON, and THOMAS A. CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ THOMAS A. CLARK
United States Circuit Judge

Received: May 6, 1981

CLERK's NOTE:
See Rule 41 FRAP and Local Rule 17 for Stay of the Mandate

APPENDIX "D"

CONSTITUTIONAL PROVISIONS AND STATUTES

I.

U.S. Constitution, Article III.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, or public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place of Places as the Congress may by Law have directed.

II.

28 U.S.C. §1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions

or require the entire record to be sent up for decision of the entire matter in controversy.

III.

28 U.S.C. §1333. Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize. June 25, 1948, c. 646, 62 Stat. 931; May 24, 1949, c. 139, §79, 63 Stat. 101.

IV.

33 U.S.C. §154. Adoption of rules for navigation of harbors, rivers and inland waters.

The following regulations for preventing collisions shall be followed by all vessels upon the harbors, rivers, and other inland waters of the United States except the Great Lakes and their connecting and tributary waters as far east as Montreal, and the waters of the Mississippi River between its source and the Huey P. Long Bridge and all of its tributaries emptying thereinto and their tributaries, and that part of the Atchafalaya River

above its junction with the Plaquemine-Morgan City alternate waterway, and the Red River of the North, and are declared special rules duly made by local authority. June 7, 1897, c. 4, §1, 30 Stat. 96; May 21, 1948, C 328, §1, 62 Stat. 249; Aug. 8, 1953, c. 386, §1, 67 Stat. 497.